UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RHCG SAFETY CORP., Employer/Respondent, and CONSTRUCTION AND GENERAL BUILDING LABORERS LOCAL 79, Petitioner/Charging Party.	**Case Nos.: 29-CA-161261** **29-RC-157827**

EMPLOYER RHCG SAFETY CORP.'S REPLY BRIEF IN RESPONSE TO PETITIONER'S BRIEF IN OPPOSITION TO EMPLOYER'S EXCEPTIONS AND IN SUPPORT OF THE ADMINISTRATIVE LAW JUDGE'S DECISION

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PRELIMINARY STATEMENT

Employer/Respondent RHCG Safety Corp. ("RHCG") submits this Reply Brief in response to Petitioner's Brief in Opposition to Employer's Exceptions and in Support of the Administrative Law Judge's Decision ("Union's Brief") and in further support of its Exceptions to the Decision of ALJ Raymond P. Green ("Exceptions") and Brief in Support thereof ("Supporting Brief"). For the reasons stated below and in its Supporting Brief, RHCG respectfully requests that its Exceptions be granted and the Decision of ALJ Raymond P. Green ("ALJ's Decision") be overturned.

ARGUMENT

1. The Union's Brief's Mistakenly Contends that the Rule of Completeness is Inapplicable to GC-3(a) and (b).

While the Union's Brief contends that RHCG misunderstands the Rule of Completeness, the reality is that, as set forth in RHCG's Motion to Exclude GC-3(a) and (b)[1] ("Motion to Exclude") and Supporting Brief, RHCG has accurately analyzed the Rule of Completeness and established that it the warrants the exclusion of GC-3(a) and (b). The Rule of Completeness mandates: "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part – or any other recorded statement – that in fairness ought to be considered at the same time." U.S. v. Ramos-Caraballo, 375 F.3d 797, 803 (8th Cir. 2004) (citations omitted).

In this case, 10 of the 22 text messages exchanged between Claudio Anderson ("Anderson") and David Scherrer ("Scherrer") during the period of July 29, 2015 to August 4, 2015 were intentionally omitted from GC-3(a) and (b). As explained in the Motion to Exclude

[1] Exhibits are labeled as "R-" and the exhibit number for Respondent's exhibits, "GC-" and the exhibit number for the General Counsel's exhibits. Citations to the transcript follow the following format: [Transcript Number, Page:Line Range].

and Supporting Brief, RHCG has satisfied its burden under both prongs of the Rule of Completeness, as these excluded text messages are clearly relevant and they would certainly put the texts at issue in GC-3(a) and (b) in context, including the text messages cherry-picked by Anderson for inclusion and exclusion in these exhibits, since the July 30 texts were obviously part of a broader conversation that took place between Anderson and Scherrer from July 29, 2015 to August 4, 2015. Additionally, the admission of GC-3(a) and (b) without the 10 omitted texts denied the ALJ a fair and impartial understanding of the evidence and misled the ALJ, as the proffered text messages set forth only about 50% of the texts they exchanged during this period. Because the 10 texts omitted from GC-3(a) and (b) no longer exist since Anderson gave his cell phone to his sister shortly before the hearing and she reset the phone, the only appropriate remedy in this case is the exclusion of GC-3(a) and (b) pursuant to the Rule of Completeness. See Goodyear Tire & Rubber Co., 273 NLRB 36 (1984).[2]

2. The Union's Brief's Inaccurately Asserts that Anderson did not Spoliate Evidence.

Initially, RHCG must correct some inaccuracies delineated in the Union's Brief, as RHCG has not asserted that Anderson intentionally destroyed text messages or gave the cell phone to his sister in Panama in an effort to prevent the disclosure of the text messages. However, regardless of whether Anderson was not malicious or vindictive in his "loss" of the cell phone, he clearly had a duty to preserve the evidence (i.e., the 10 omitted text messages and

[2] While the Union's Brief cites to U.S. v. Thompson, 501 Fed. Appx. 347, 364 (6th Cir. 2012) in support of its contention that the Rule of Completeness is inapplicable here, that case is inapposite. In Thompson, the Appellate Court agreed with the District Court's finding that the Rule of Completeness did not warrant the admission of a longer videotaped interview with the defendant given that the court admitted a shorter televised news clip of that interview, as the government was not in possession of the entire interview. Importantly, a significant difference between this case and Thompson is the fact that the government's lack of possession of the longer interview was not on account of its spoliation of evidence, unlike Anderson in this case.

the cell phone from which he sent and received texts with Scherrer during July 29, 2015 to August 4, 2015), which is undoubtedly relevant in this case since they shed light on the context of the texts exchanged between Anderson and Scherrer (including the alleged July 30 texts at issue), and the "culpable state of mind" required by the standard is satisfied by showing that evidence was destroyed negligently. See Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 107-109 (2d Cir. 2002); Byrnie v. Town of Cromwell, 243 F.3d 93, 107–12 (2d Cir. 2001). As such, as establish in its Supporting Brief, RHCG satisfied the standard for an adverse inference to be drawn against Anderson, which should have been for the ALJ to give no weight to the text messages in GC-3(a) and (b) and to Anderson's testimony regarding these texts.

Moreover, despite the Union's Brief's attempts to drum up sympathy for Anderson's spoliation of evidence by presenting him as an immigrant worker with no experience in Board procedures, it is undisputed that Anderson knew well in advance of his testimony at the hearing that he was going to be a witness in this proceeding and that the alleged July 30, 2015 text messages from Scherrer were going to be a part of this proceeding. (T7, 953:5-16, 954:9-21; R-19, ¶ 1; GC-3(b)). Nevertheless, he egregiously and inexplicably gave the cell phone with which he sent and received text messages with Scherrer from July 29 to August 4, 2015 to his sister in Panama approximately one week before the first day of the hearing. (ALJD 3:21-27[3]; T1, 43:2-5, 53:7-9, 54:8-12, 54:18-19; T7, 957:9-17). Not only did he not have access to the phone or the text messages at the time of the hearing, his sister reset his old cell phone, which deleted all of the text messages. (ALJD 3:21-27; T7, 959:20-22, 959:25 to 960:5, 960:17-24).

Further, while the Union's Brief contends that GC-3(a) and (b) constitute coherent, complete, and consistent exchange, the reality is that these exhibits are anything but coherent,

[3] Citations to the ALJ's Decision are listed as: ALJD, then the relevant page and line number/s.

complete, and consistent given that they omit 10 of the 22 texts exchanged between Anderson and Scherrer from July 29 to August 2, 2015. In addition, while the Union's Brief's attempts to shift the focus onto Scherrer's cell phone[4] and seems to incorrectly allege that timing of the service of the subpoena duces tecum onto Anderson, which was undoubtedly timely, contributed in some way to his spoliation of evidence, these attempts to detract from Anderson's culpability for his spoliation of evidence are ineffective. Moreover, these red herrings cannot detract from the fact that the party who introduced GC-3(a) and (b) for admission into the record bears the burden of establishing the admissibility of that evidence. See FRE 901.

3. The Union's Brief Badly Misses the Mark Regarding its Contentions as to Anderson's Credibility.

Anderson's credibility issues have been well documented in RHCG's Exceptions and Supporting Brief. As such, RHCG will not belabor the point in this Reply Brief, especially considering that the Union's Brief is completely ineffective in its attempts to clear up the myriad of Anderson's inconsistencies. However, RHCG must note that, contrary to the naked assertion in the Union's Brief, RHCG has not made any misstatements of the record or engaged in any misleading efforts regarding Anderson's inconsistent testimony, especially regarding his execution of a Union authorization card. Further, although the Union's Brief references the fact that Anderson is not a native English speaker, that is irrelevant since it does not constitute an excuse for the inconsistencies in his testimony, especially given the fact that Anderson chose to testify in English and declined to use a Spanish language interpreter. (T1, 29:7-13).

[4] The Union's Brief also baldly asserts that Scherrer deleted text messages from his cell phone, there is no testimony or evidence in the record to support such an assertion.

4. The Union's Brief Wrongly Contends that the ALJ's Decision Appropriately Analyzed RHCG's Alleged Unlawful Discharge of Anderson and Reached the Correct Conclusion.

The Union's Brief mistakenly contends that the ALJ's Decision correctly applied Wright Line, 251 NLRB 1083 (1980). However, as explained in RHCG's Supporting Brief, the ALJ's Decision did not apply Wright Line and the General Counsel fell short of meeting its burden under Wright Line to prove that Anderson was discharged and that his union support or other protected activity was a motivating factor in RHCG's decision to take that or other alleged adverse employment action against Anderson. Further, like the ALJ's Decision, the Union errs by asserting that the alleged July 30, 2015 text messages from Scherrer to Anderson established that Anderson was discharged because of RHCG's antiunion animus. However, as noted above, the text message should have been excluded as a preliminary matter under the Rule of Completeness. In addition, an analysis of the facts regarding the cessation of Anderson's employment demonstrates that there was no adverse action and no antiunion animus toward Anderson for his alleged union activity. At Anderson's request, Scherrer brought him to 5740 Broadway and, when work slowed down at that jobsite, moved him to 2301 Tillotson Avenue. (T2, 282-285, 290, 327, 338-39; T1, 96:7 to 97:2; R-3). Anderson subsequently took time off knowing that he could be replaced and, when he came back and met with Scherrer, there was no work available for him at Scherrer's jobsites. (T1, 84:1-5, 93:3-11; T2, 291-293, 324-325, 327, 341-342). As a result, Scherrer told him to contact Supervisor Nick Pavone and other supervisors to obtain work. (T2, 291-293, 324-325, 327, 341-342). Further, RHCG subsequently hiring employees for the concrete division does not establish that RHCG had animus toward Anderson for his alleged protected activity, as assignments are made on an ad hoc basis, there is no list of employees who need work in the concrete division, Scherrer did not have any work for Anderson

at the time they met in August 2015, Anderson failed to contact Pavon or other supervisors, and Scherrer didn't keep track of Anderson after he took time off.

5. The Union's Brief Incorrectly Asserts that the ALJ's Decision Analyzed RHCG's Alleged Unlawful Interrogation of Anderson Under the Appropriate Standard and Reached the Correct Conclusion.

The Union's Brief's mistaken assertion that the ALJ's Decision appropriately administered the test for an alleged unlawful interrogation turns Bourne[5] on its head. Although the Bourne factors "are not to be mechanically applied in each case," (Westwood Health Care Center, 330 NLRB 935, 939-940 (2000)), they still have to be applied, which the ALJ's Decision failed to do. Not only did the Union's Brief fail to address a single Bourne factor, it made the same mistake as the ALJ's Decision by summarily and self-servingly declaring that, pursuant to the July 30, 2015 text messages, the text messages constitute an unlawful interrogation. However, as RHCG demonstrates in its Supporting Brief, the application of the Bourne factors shows that RHCG did not unlawfully interrogate Anderson.

6. The Union's Brief Wrongly Contends that Nicholas Rodriguez Acted as an Agent of RHCG.

The Union's Brief mistakenly argues that Nicholas Rodriguez ("Rodriguez") is, essentially, a perpetual agent for RHCG. As stated under 29 USC § 152(13), "[a]n employee is an agent if he has actual or apparent authority to act on the employer's behalf or the employer subsequently ratifies the employee's conduct." See also, Diehl Equip. Co., 297 NLRB 504 (1989). The Board has rejected this perpetual agent argument, as well as the argument "that a translator, solely because he or she is a translator, is an agent for all purpose." Ocean State Jobbers, Inc., 345 NLRB 1267, 1274 (2005). As stated in the Supporting Brief, Rodriguez was

[5] See Bourne v. NLRB, 332 F. 2d 47 (2d Cir. 1964).

not an agent and there was no basis for Anderson to believe this. As such, the Board should find that Rodriguez was not an agent of RHCG.

7. The Union's Brief Mistakenly Asserts that RHCG had to Provide Cell Phone Numbers of its Employees in the Voter List.

The Union's Brief incorrectly asserts, in support of the erroneous conclusion in the ALJ's Decision (ALJD 6:12-14), that the Voter List was deficient because it did not contain employee's cell phone numbers or email addresses.[6] However, as discussed in its Supporting Brief, RHCG satisfied its obligation to provide a Voter List that contained the information available to it with respect to employee's personal cell phone numbers and email addresses. Further, the Union's contentions (and ALJ's conclusions) ignore the Election Rule's plain language. The rule is clear: within "*2 business days* after issuance of the direction" of an election, an employer must produce "contact information (including home addresses, *available* personal email addresses, and *available* home and personal cellular ("cell") telephone numbers) of all eligible voters." 29 C.F.R. § 102.67(l) (emphasis added). The Union's Brief and ALJ's Decision ignore the import of the word "available." In interpreting the regulation, the Board must presume that the regulation says what it means and means what it says. See BedRoc Ltd., LLC v. United States, 541 U.S. 176, 183 (2004). The term "available" is not superfluous. See Beck v. Prupis, 529 U.S. 494 (2002). Yet, the Union's Brief and ALJ's Decision essentially treat the word "available" as such.

Though one need not look beyond the plain language of the regulation[7], the ALJ's Decision is further undermined by the definition of "available," which means "easy or possible

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[6] There is absolutely no evidence in the record that shows RHCG had a personal email address for any employee, let alone any of the employees on the Voter List.

[7] It is clear that in passing the recent changes to the Election Rule, it was envisioned that "'available' means an employer need only provide employee personal contact information already in the employer's possession and 'do[es] not require the employer to ask the employee for it.'" 79 Fed. Reg. 74452 n.654.

to get or use" and "present or ready for use." Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/available (August 9, 2016, 4:00PM). The Union's Brief and ALJ's Decision basically ignore this definition, and in effect, conclude that that if information exists, then it is "available," thereby rendering the Election Rule's use of "available" superfluous.

Both the ALJ and Union have failed to properly consider the undisputed fact that RHCG did not maintain employees' cell phone numbers in a database and did not require employees to provide such information and never has. (T8, 1085:17 to 1086:12; T2:9-16). As such, employees' cell phone numbers were simply not available to RHCG when it compiled the Voter List. Instead of acknowledging this fact, the Union further mistakenly contends that the absence of a database is irrelevant because RHCG had possession of the cell phone number given that the numbers were stored in the business cell phones of supervisors and foremen. However, this assertion is based, in large part, on circular reasoning, namely the Union's and ALJ's erroneous interpretation of the word "available."

Moreover, while Chris Garofalo ("Garofalo") testified generally that supervisors may have employees' cell phone numbers saved in their phones, Scherrer was the only supervisor who testified to having any employee's cell phone number in his *personal* phone. The Union's Brief and ALJ's Decision unduly extrapolated and imputed the testimony of Garofalo and Scherrer to all supervisors and foremen, which is the basis for the erroneous contention that employees' cell phone numbers were "available" to RHCG. Further, this contention not only ignores Andre Marc-Charles' ("Marc-Charles") undisputed testimony, but attempts to describe the personal cell phones of 90-plus supervisors as databases that RHCG must search within two days pursuant to Danbury. See Danbury Hospital & AFT Connecticut, Case No. 01-RC-153086, at 2 (RD Suppl. Dec. Oct. 16, 2015). In doing so, both the ALJ and Union have completely

ignored that RHCG is unique in this regard and unlike "the bulk of employers" that the Board presumed would not be "unduly burdened by the final rule's voter list time frames." See 79 Fed. Reg. 74354. The idea that information is available because one of these supervisors at one of these job sites may or may not have an employee's phone number is expanding the requirements of the Excelsior List far past what was initially intended. Moreover, as addressed in more detail in RHCG's Supporting Brief, requiring RHCG to engage in the Herculean effort required to locate and compile such information within 2 days would have imposed a significant and undue burden.

8. The Union's Briefly Incorrectly Argues that RHCG did not Apply the Steiny/Daniel Formula.

The Union's Brief incorrectly asserts that RHCG utterly disregarded the Steiny/Daniel formula in compiling the Voter List. Putting aside that there was not a single person identified who was eligible to vote who did not have their vote counted, the Union's contention is unsupported. Marc-Charles specifically testified that he followed Steiny-Daniel. (T8, 1054:2-11). The Union's assertion relies on the fact that 13 challenged ballots, who RHCG appropriately challenged and Marc-Charles removed from the Voter List (T8, 1051:6-7) under the premise that they voluntarily quit working for the company, were ultimately deemed eligible to vote. Despite the fact that these 13 individuals were eligible to vote and did vote, their exclusion from the list is being used improperly as a sword to attack the accuracy of the Voter List with respect to the application of Steiny/Daniel. While these individuals were found to not have "evinced a desire to abandon his relationship"[8] with RHCG, the difference between the common understanding of those employees who had voluntarily quit and the legal understanding requiring an employer to prove that these individuals "evinced a desire to abandon his relationship" does not mean that

[8] See MEC Construction, Inc. v. NLRB, 161 Fed. Appx. 315 (4th Cir. 2006).

RHCG disregarded the Steiny-Daniel formula. As such, there is no basis to contend RHCG did not apply the Steiny-Daniel formula and any assertion that there were likely other individuals eligible under Steiny-Daniel that were left off the Voter List is sheer speculation.

9. The Union's Brief Erroneously Contends that the Election Results Should be Overturned Because of any Errors in the Voter List.

The Union's Brief discussed errors in the employees' addresses in Voter List, but still fails to satisfy its heavy burden of proving that the election should be set aside. While Union contends that the Voter List is also about its ability to contact voters, it ignores that it undoubtedly contacted many employees in advance of the election notwithstanding any alleged inadvertent errors in the Voter List, as well as discounts the high voter turnout, which actually demonstrates the Union's ability to contact, and success in contacting, many of the individuals on the Voter List. It should be noted that if the impediments to contacting employees were as significant as the Union contends due to any alleged inadvertent errors with employees' addresses in the Voter List, one would think that voter turnout for the election would have been significantly lower than it was.

CONCLUSION

For all of the foregoing reasons, we respectfully request the Board to grant RHCG's Exceptions and overturn the ALJ's Decision.

Respectfully submitted,

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Dated: August 10, 2016

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